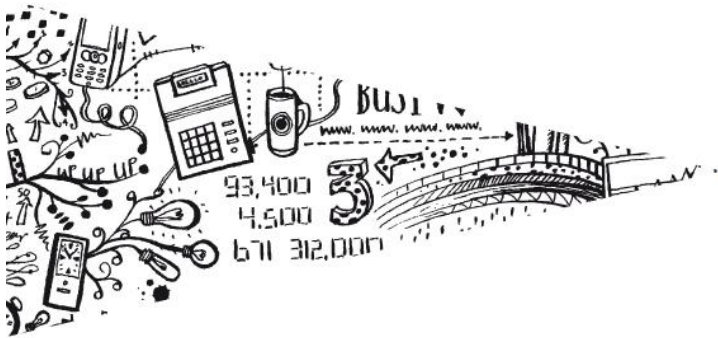


17 November 2011

EY Tax Alert

Service tax on export of marketing services: matter referred to Third Member by Delhi Tribunal



Executive Summary

This Alert summarizes the order dated 9 November 2011 passed by the Delhi bench of Customs Excise and Service Tax Appellate Tribunal (“CESTAT”) in the case of Microsoft Corporation India Private Ltd vs CST.

The issue involved in the case was whether the activity of marketing and promotion of foreign principal's products in India qualifies as export and accordingly does not require payment of service tax.

The Judicial Member of CESTAT held that the services do not qualify as export whereas the Technical Member was of the contrary view. Due to the difference of opinion, they referred the matter to a Third Member.

Factual Background

- ▶ Microsoft Corporation India Private Ltd (“the Appellant”) entered into an agreement with Microsoft Operations Pvt Ltd, Singapore (“MOPL”) to render the services of marketing MICROSOFT products in India.
- ▶ The consideration payable for the above services was fixed on a cost plus mark-up basis.
- ▶ The Appellant claimed that services were covered under the category of Business Auxiliary Services (“BAS”) and were qualified as export under the Export of Service Rules, 2005 (“Export Rules”) as the recipient of services (MOPL) was based outside India.

- ▶ The Revenue disputed the position and raised a demand of service tax for the services rendered during the period July 2004 to December 2009, which was appealed against by the Appellant before the CESTAT.

Decision of the Tribunal

- ▶ The Judicial Member opined that goods and services should be given equal treatment on the basis of the principle of equivalence. Thus, like goods, services should be treated as export only when they are taken out of the country. Applying this principle, the Judicial Member held that in the present case the market promotion services were performed by the Appellant in India and were ultimately consumed in India (since the customers of MOPL were in India). As the services failed to move out of India, they cannot be treated as ‘export’.
- ▶ The Technical Member dissented with the above views by observing that goods and services are not exactly equivalent in all the matters related to taxation, since the former is tangible and latter is not. He held that it is difficult to conceive of taking services across the border and, therefore, the issue should only be analyzed in light of Export Rules under which services are treated as export on the basis of the situs of the property or activity or the person receiving the service. It was concluded that as the recipient (MOPL) of the BAS services provided by the Appellant was located outside India, the services qualify as export and the place of performance of the service was inconsequential.

- ▶ In view of the conflicting opinions of the Members, the following key questions have been referred to a Third Member of the Tribunal for adjudication:

- ▶ Whether the services of promotion of market in India for foreign principal tantamount to export of services?
- ▶ Whether the export of BAS is governed by the principles of equivalence?

Our Comments

The service exporters were expecting a favourable outcome on the dispute, as their refunds involving millions of rupees have been litigated by the Revenue on this point. They will need to wait for the order of Third Member, who will be appointed by the CESTAT President.

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